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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-870

FORD MOTOR COMPANY,
Appellant,

v.

WILLIAM T. COLEMAN, JR.,
Secretary of Transportation, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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The Government seeks to convey the impression that the penalty scheme of the Traffic Act deters a manufacturer from seeking a court trial on the validity of the agency's directive only where the manufacturer's defense is frivolous. But under the district court's holding, even the manufacturer with substantial, non-frivolous grounds for going forward with such a trial remains fully exposed to the penalties for doing so—save only when it can prove at a preliminary hearing that it will ultimately prevail on the merits. The Government's motion to affirm fails to deal with this central point of Ford's appeal.

The Government's motion to dismiss should be denied because (i) resolution of the constitutional issue presented here by Ford affects all manufacturers' con-

tinuing relations with the National Highway Traffic Safety Administration in an important segment of the economy; and (ii) there is no better way than this case—indeed, there may be no *other* way—in which Ford can ever bring this extraordinary penalty scheme before this Court.

1. The Government's Motion to Affirm Should be Denied

The Government has no answer to Ford's points that in the proceeding before the administrative agency there is no sworn testimony, no right to cross-examination, and no subpoena power—all essential elements of due process. Likewise, the Government does not contest that the proceeding culminates in an administrative directive to the manufacturer, unsupported by any findings of fact or conclusions of law, to recall hundreds of thousands of vehicles and to replace component parts at enormous expense to the manufacturer; that the purported basis for any such directive is a legislative standard of "unreasonable risk," which after a decade remains unelucidated by statute, regulation, or administrative decision; and that the manufacturer can obtain a court hearing of any good-faith disagreement with the agency's directive only at the risk of incurring hundreds of thousands of dollars in civil penalties—some of which the statute would permit the Government to levy even if the manufacturer prevails on the merits in the district court enforcement proceeding.

The whole point and purpose of the penalty scheme is to "chill" the manufacturer—to deter it from exercising its right to the *only* due-process hearing it obtains under the statutory scheme (*see* J.S. App. 49A)

(Hart, J., dissenting). The Government has acknowledged as much: "It is the very threat of civil penalties, which may be assessed by the Court in an amount up to $800,000, which is designed to encourage manufacturers to comply with the Administrator's orders to notify with respect to and remedy safety related defects"—*i.e.*, to acquiesce without invoking their right to a trial *de novo,* which the statute ostensibly grants.[1]

In this Court, the Government points to the language of the majority below that "the statute, fairly read, permits the manufacturer who has a substantial, nonfrivolous challenge to the validity of the Administrator's determination to obtain a preliminary injunction" against enforcement of the penalties (J.S. App. 11A). The Government thereby seeks to slip past the core point of Ford's appeal: under the three-judge court's holding (as distinct from its language), whenever the enforcement court cannot determine on the preliminary injunction hearing that the manufacturer is likely to prevail at trial, the remedy which purportedly saves the constitutionality of the Act suddenly ceases to be available—even where the manufacturer's case is substantial and non-frivolous. The manufacturer can then proceed with the *de novo* trial only at the risk of incurring large penalties. In other words, the statutory grant of a fair "chance . . . for a test of a reasonable objections," required by the past decisions of this Court,[2] vanishes once the Government

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[1] Plaintiff's Motion for Stay of Preliminary Injunction Under 15 U.S.C. § 1415(e)(1) Pending Appeal, at 8, in *United States* v. *Ford Motor Co.*, C.A. No. 76-0029 (D.D.C. Jan. 28, 1976) ("windshield wiper" case). This statement of the statutory purpose is consistent with the legislative history. *See* J.A. 19 n.19.

[2] *E.g., United States* v. *Morton Salt Co.*, 338 U.S. 632, 654 (1950).

meets and passes the point of so-called "equipoise" in a summary preliminary injunction hearing (*see* J.S. 12-15). That constitutional deficiency cannot be squared with this Court's precedents upon which the two-judge majority below and the Solicitor General both purport to rely (*see* J.S.App. 13A; Motion at 6-7).

2. The Government's Motion to Dismiss Should be Denied

The Government carefully avoids asserting, but it indirectly intimates, that Ford's appeal is moot by reason of the statutory injunction granted in the Government's pending enforcement suit.[3] That suggestion is incorrect for three reasons.

First, Ford is subject to continuous regulation of the National Highway Traffic Safety Administration. The statutory penalty scheme has an undeniable impact every time Ford disagrees with the validity of an administrative recall directive. As the amicus brief of the Automobile Importers of America confirms, the ever-present threat of penalties colors all dealings between the agency and manufacturers subject to its regulation. Thus, "the underlying question persists and is agitated by the continuing activities and program" of the agency, which continually seeks to require recall and repair. *Cf. Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 179

[3] The Government states it will not appeal the order granting the statutory injunction (Motion at 4 n.1). We assume that the Government likewise concedes it cannot subsequently move to dissolve that injunction before the district court—a concession already made by Government counsel in another case involving appellant, *United States* v. *Ford Motor Co.,* C.A. No. 76-0029 (D.D.C.) ("windshield wiper" case). There, unlike here, the Government has appealed the enforcement Court's grant of the statutory injunction.

(1968); *see generally* R. Stern & E. Gressman, Supreme Court Practice, 588 (4th ed.). The "hardship" which Ford suffers because it is subject to the penalty scheme thus is "actual" and continuous, *cf. Poe* v. *Ullmann,* 367 U.S. 497, 509 (1961) (opinion of Frankfurter, J.); it permeates Ford's daily relations with the administrative agency. In sum, Ford's appeal presents a question central to the day-to-day administration of the Traffic Act; the issue presented here should be authoritatively resolved.

Second, Ford's appeal cannot in any event be moot, because the company's challenge to the provisional notification section remains alive (J.S. 19-22). The Government refrains from disavowing its intent to order such notification in the instant case. To the contrary, it agrees with Ford that "the Administrator can order the provisional notification at any time," and instead rests on the notion that he has not yet done so (Motion at 5 n.2). The Government, however, misapprehends the nature of Ford's challenge to this aspect of the penalty scheme: the Administrator's statutory power to order provisional notification overhangs the manufacturer before the enforcement suit is instituted (when the manufacturer is considering whether to acquiesce in a recall directive or to seek judicial review) and at every step of the legal proceedings thereafter. That threatened administrative action is part and parcel of the Traffic Act's effort to deter manufacturers from seeking judicial review of the Administrator's fiats.[4]

[4] The threat is not removed even if the manufacturer obtains the statutory injunction. Indeed, the Government recognizes that "the Act does not provide a procedure for restraining the enforcement" of a provisional notification order of the Administrator (Motion at 5 n.2).

Third, the Government suggests that Ford can always reassert its constitutional claim in subsequent litigation. But it is difficult to see how the matter could reach this Court in a posture in which the Solicitor General would not resist review on grounds of either mootness or lack of standing. In any future controversy in which the Administrator directs Ford to conduct a recall and repair, Ford will sue before a three-judge court to enjoin the Act's penalty scheme;[5] as in the present case, the Government will immediately commence a separate enforcement action against Ford to compel compliance with the Administrator's order, and Ford will then move in that action for the statutory injunction under Section 155(c)(1).[6] If the three-judge court follows the decision of the court below in the present case and if an injunction is granted in the Government's enforcement action, Ford's appeal to this Court will be in the same posture as in the instant proceeding, and the Government presumably will move to dismiss on the grounds asserted here.

If, on the other hand, Ford's application for the statutory injunction is denied in the Government's enforcement action, Ford's appeal from the judgment of the three-judge court will fare no better. Absent a stay *pendente lite,* Ford will either have to abandon its defense of the enforcement suit (in the face of the threatened penalty), in which event its three-judge court case will be asserted by the Solicitor General to be moot; or Ford will continue to assert its defense

[5] In the "windshield wiper" case, *supra,* Ford did not ask for a three-judge court because of the pendency of the instant action.

[6] The Government will no doubt argue that the outstanding judgment below, which the Government would leave intact, raises the bar of *res judicata* in any future three-judge court case.

on the merits in the enforcement action, in which event the Solicitor General will urge that Ford lacks standing to press its constitutional claim in this Court because it has not been deterred by the penalty scheme from defending itself.

By the same token, Ford cannot look to a petition for certiorari from a Court of Appeals' affirmance of a final judgment by a district court awarding penalties. In such circumstances, the Government will again contend that Ford lacks standing to present the constitutional claim because it was not deterred by the penalty scheme from defending the enforcement suit.

In sum, for all practical purposes, the Government would foreclose Ford from ever obtaining a hearing in this Court on appellant's basic constitutional challenge to the extraordinary penalty scheme imposed by the Traffic Act, whether or not Ford contests an administrative determination, and whether or not appellant obtains the statutory injunction in the enforcement suit. Ford's present appeal thus presents a constitutional challenge to one in an inevitable series of administrative orders "capable of repetition, yet evading review. . . ." *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498, 515 (1911).

The Government concedes that the Court has jurisdiction to hear Ford's appeal, but urges the Court to decline to exercise that jurisdiction on the theory that "the abstractness of the questions presented . . . makes this an inappropriate vehicle for constitutional adjudication" (Motion at 4). Even on the debatable assumption that the Court may dismiss on discretionary grounds an otherwise properly presented appeal from the judgment of a properly convened three-judge fed-

eral district court, the Government's contention is unpersuasive. There is nothing abstract to Ford's case. Appellant contends that the penalty scheme of the Traffic Act unlawfully coerces it to forgo its right to judicial review of an administrative recall and repair directive—a directive issued without adherence to the most elementary precepts of due process (*see* J.S. 7, 23). The three-judge district court did not deem this clearcut, precise constitutional issue too "abstract" for judgment, and the Government raised no such objection below. The constitutional issues at stake are "presented with the clarity needed for effective adjudication" as surely in this Court as they were below. *Cf. Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 589 n.2 (1972). Moreover, no further proceeding below, whether in this case or in any other action arising under the Act, could further sharpen the "usual considerations of timeliness and maturity, of concreteness, definiteness, certainty, and of adversity of interests affected" as they already exist now. *Cf. Rescue Army* v. *Municipal Court*, 331 U.S. 549, 573 (1947).[7]

[7] The cases relied upon by the Government (Motion at 4) lend no support to its position. In *Socialist Labor Party, supra*, "all issues litigated below [had] . . . become moot except for one that received scant attention in appellants' complaint and was treated not at all in the affidavits filed in support of the cross-motion for summary judgment." 406 U.S., at 589. Moreover, as to the one issue—the requirement of an executed "loyalty oath" as a precondition to placement of candidates' names on the ballot—"appellants [had] . . . apparently signed the oath at previous times, and so far as this record shows they have suffered no injury as a result." *Id.*, at 588. Both *Rescue Army, supra*, and *DeBacker* v. *Brainard*, 396 U.S. 28 (1969), arose from state courts, not three-judge federal district courts. In the former case, that key difference generated a "serious problem of [state statutory] construction relating . . . to the terms of the questioned legislation [and] . . . to its interpretation by the state courts," 331 U.S., at 584; in the latter, the appeal essentially no longer presented a substantial federal question in light of intervening decisions which denied retroactive effect to the constitutional doctrines there involved, 396 U.S., at 30.

For the foregoing reasons, Ford Motor Company respectfully submits that the Government's motion to dismiss or affirm should be denied, and that the Court should note jurisdiction of Ford's appeal.

Respectfully submitted,

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